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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 082 50991 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mary Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion.[1] The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submitted a brief not merely contesting the conclusions reached in the decision, but the reviewing officer's command of the English language. The AAO concluded that the record did not support counsel's most serious accusations and dismissed the appeal.

Counsel continues to accuse Citizenship and Immigration Services (CIS) of incompetence and bias on motion. Counsel's most persuasive assertion relates to the witness letters referenced by counsel in his initial cover letter but missing from the record of proceedings when reviewed by the AAO. We did not and will not speculate, as counsel does, as to why those letters were absent from the file. Those letters are now part of the record and will be considered below. While counsel's motion is responsive to that concern raised by the AAO, counsel does not address or submit evidence relating to another issue raised by both the director and the AAO, the lack of evidence supporting claims that the petitioner has been cited. As this deficiency has been repeatedly noted, such evidence cannot be considered in support of any future motions. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Counsel's assertion that the AAO is "an apologist for stupidity," is not supported by the record. In our previous decision, the AAO withdrew certain findings by the director that were inconsistent with the relevant precedent decision, although we would not characterize those findings as "stupid." We affirm that the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. The AAO is not bound to follow a decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In response to counsel's repeated concerns that this office contains biased "judges" appointed by a previous administration, we simply note that the adjudicators at this office are hired by office management through typical civil service hiring procedures; they are not political appointees. Thus, counsel's personal opinions regarding the quality of appointments made by that administration have no relevance to this matter.

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[1] Counsel lists the receipt number for the national interest waiver petition at issue. He also, however, references "extraordinary ability" at the top of the motion and references the denial of a "companion NIW case." Given the specific references in the remainder of the motion to the national interest waiver denial, we presume that this is a motion on the national interest waiver decision.

Finally, we fail to see the relevance of counsel's alleged role in having an immigration judge removed from office other than as a direct threat. Such language is unambiguously contumelious and has no place in these proceedings. We fail to see how responding favorably to such assertions, in the absence of evidence of eligibility, would provide the type of "reasoned decision" requested by counsel.

The relevant law was quoted in our previous decision and need not be repeated here. The sole issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The controlling precedent is *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), which has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

As stated in our previous decision, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, civil and environmental engineering, and that the proposed benefits of her work, improved sensor technology, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

More specifically, at issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

On motion, counsel's sole concern is that the AAO failed to give sufficient weight to the reference letters and quoted them out of context. The motion was counsel's opportunity to challenge all of our conclusions. Thus, we presume that counsel does not contest our conclusions regarding the other evidence of record. Specifically, we affirm our conclusion that the acceptance letters for other graduate programs have no relevance to this petition. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. *Id.* We cannot conclude that any graduate applicant who gains admission to prestigious universities warrants a waiver of job offer requirement in the national interest.

Similarly, counsel does not contest that the article in the University of Illinois at Chicago's College of Engineering Magazine discussing the work of Professor [redacted] the petitioner's collaborator, does not

address a project on which the petitioner worked. Finally, counsel does not contest that the grant proposal does not identify the petitioner as key personnel or at all.

In light of counsel's specific concerns regarding our analysis of reference letters, we will revisit our analysis of those letters, including those that were not in the record of proceedings on appeal. In our previous decision, we carefully considered every reference letter included in the record of proceedings, including the "advisory letters." Counsel expresses outrage at the AAO's statement that "advisory letters are just that, advisory." While we fail to see how that statement relies on flawed logic, were that the only statement made on this issue, we could understand counsel's concern. Counsel, however, takes this statement out of context. The full paragraph that begins with that sentence continues:

> While letters from high-ranking experts in the field are useful in evaluating a petitioner's claimed contributions to the field, the content of the letter must be evaluated and the record as a whole must be the basis of the final determination. In evaluating the content of reference letters, Citizenship and Immigration Services (CIS) considers letters that identify specific contributions ***and explain how those contributions have already influenced the field*** more persuasive than letters that simply discuss the importance of the project and provide general praise of the petitioner's skills and rank the petitioner in relation to others in the field.

(Emphasis added in this decision.) We see no reason to withdraw any of the above language. We acknowledge that the director requested advisory letters. We agree that such evidence, especially when specifically requested, should not be ignored. The AAO, however, has not "ignored" any letters, as alleged by counsel. Rather, the content of the letters was carefully considered in the context of the entire record of proceedings. To suggest that the submission of an advisory letter is automatic evidence of eligibility regardless of what is stated in that letter and the remaining evidence of record defies logic and is an untenable position for this office to take. As will be discussed below, while we agree with counsel that several references do identify specific contributions, they fail to explain how those contributions have already influenced the field.

Counsel then challenges the AAO's analysis of the letters. For example, counsel quotes the following language from our initial decision:

> Second [redacted] asserts that the petitioner is a "key developer" for the Adaptive Real-Time Geoscience and Environmental Data Analysis, Modeling and Visualization, a new technology to protect the environment and forecast natural disasters. [redacted] does not, however, identify a specific contribution made by the petitioner ***to this project*** or attest to any success this project has enjoyed.

(Emphasis added in this decision.) Counsel concludes:

> This sentence is patently false, as anyone who actually reads [redacted] letter (included, Appendix B) will easily see, but even worse, [the AAO] is substituting his lay opinion of what is important and what is not important in this highly technical field for that of an acknowledged expert. He does the very same thing with all of the other letters from experts.

> In [redacted] letter, [redacted] states, "[the petitioner] has successfully developed a PVDF material wireless sensor for structural monitoring."
>
> Is this not a specific contribution? Why did [the AAO] ignore this and other sentences in the letter?

By quoting only our second paragraph regarding [redacted] letter, counsel, once again, takes our discussion out of context. The first paragraph of our discussion bears repeating in its entirety:

> [redacted] a professor at UC Irvine, asserts that she knows the petitioner professionally and classifies her as an extraordinary researcher who has successfully worked on projects "founded" by the National Science Foundation (NSF) and the U.S. Air Force. First, [redacted] explains that monitoring technology is vital to securing the integrity of structural systems including buildings, bridges and utility facilities. She further asserts that conventional monitoring systems are not used in large numbers because they are large, expensive, require high power and require electrical cables for signal transmission and power supply, making them susceptible to lightening strikes. According to [redacted] the petitioner developed a cheaper, wireless PVDF sensor for structural monitoring that shows "great potential for overcoming the difficulties associated with conventional sensors." Later in the letter, [redacted] asserts that the PVDF sensor is the first in the world and can monitor a full-scale skyscraper. [redacted] does not identify a skyscraper that has been successfully monitored by PVDF or an agency that has adopted or licensed the sensor technology.

Thus, the AAO did not fail to acknowledge [redacted] comments about PVDF sensors, but made the valid observation that while [redacted] affirmed the potential for these sensors, she did not indicate that anyone was adopting them. It is clear that the PVDF monitoring system is *a completely separate project* than the Adaptive Real-Time Geoscience and Environmental Data Analysis, Modeling and Visualization. Thus, PVDF is not a specific contribution "to this project." Given counsel's concerns on this issue, we will quote [redacted] entire discussion of the Adaptive Real-Time analysis project:

> [The petitioner] is also a key developer for the project *Adaptive Real-Time Geoscience and Environmental Data Analysis, Modeling and Visualization.* This is a very important new technology to protect our national environmental [sic] and forecast natural disasters. This project includes a database of environmental information, wireless communication, [a] data analysis model, [and a] finding and forecasting system. This research will help our country to set up a real-time, highly reliable, economic environmental monitoring and protection system.
>
> It should be noted that environmental monitoring, simulation and visualization is perhaps one of the [the] most complicate[d] areas in information system development, because it requires not only [a] solid understanding of environmental science and engineering, physics, chemistry and mathematical modeling, but also computer science.

Nothing in the above paragraphs identifies specifically what the petitioner personally has contributed to ***this project***. Thus, there is nothing "patently false" about the statement quoted by counsel, which used the phrase "this project." As noted by the AAO but omitted by counsel, the AAO separately addressed [redacted] conclusions regarding the Adaptive Real-time technology. Specifically, the AAO acknowledged that [redacted]

attests to the technology's complexity and predicts that this area of research will be useful nationally. As is confirmed by the letter from [redacted] an associate professor at Lehigh University, however, the Adaptive Real-Time analysis project was in its early stages at the time of filing. We continue to find that the petitioner has not established the influence of this project on the field at the time of filing. In light of the above, we find that counsel's concerns regarding our analysis of [redacted] letter have no merit.

In his initial letter, [redacted] Program Director of the Division of Civil and Mechanical Systems in the Directorate for Engineering at the National Science Foundation (NSF), asserts that he first met the petitioner while she was a student at Tongji University and currently interacts with her during his frequent visits to UC Berkeley. [redacted] describes the petitioner's research on two projects "founded"[2] by NSF and a U.S. Air Force project as "truly outstanding." Specifically, [redacted] asserts that the petitioner "successfully measured and modeled the low frequency response and the hybrid characteristic of the PVDF materials and then developed a very promising PVDF sensor, which could meet the needs for the civil structure monitoring in an unusually effective way – the first of this kind in the professional domain." Regarding the petitioner's work on Adaptive Real-Time Geosciences and Environmental Data Analysis, Modeling and Visualization, [redacted] asserts that the petitioner worked with piezo-material sensors, ultrasonic sensors, and non-destructive testing of structures and materials. [redacted] concludes that this work "has been well known and highly raised and valued by her colleagues, professional and users." As noted by the AAO, [redacted] does not provide any examples of "users."

On motion, counsel challenges our concern that the "users" have not been identified as "inane," but fails to explain our error in noting this lack of information. If, in fact, there are users of this technology, that information is material and could significantly bolster the petitioner's claim of eligibility. We need not, however, accept an unsupported assertion that such "users" exist, especially when they have not been identified, let alone submitted their own letters of support confirming their use of the petitioner's technology. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO further acknowledged the second letter from [redacted] in which he emphatically asserts that his initial letter constitutes an advisory opinion. [redacted] continues:

> The fact that I am taking time to write a SECOND Advisory Opinion when your examiner couldn't take the time to read the first letter is a strong indication that [the petitioner] is INCREDIBLY VALUABLE TO NSF PROJECTS THAT ARE IN THE NATIONAL INTEREST, and THAT WE FULLY EXPECT THAT THE PROSPECTIVE BENEFIT OF ISSUING THIS WAIVER TO HER WILL RESULT IN RESEARCH THAT WILL BENEFIT THE NATIONAL INTEREST.
>
> [The petitioner] is working on a project that is funded by NSF. As I stated in my previous letter, she is UNIQUELY QUALIFIED TO DO THIS WORK, and her results so far have been spectacular.

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[2] As made apparent in our previous decision, several reference letters include "founded" where the author presumably meant "funded." While we draw no conclusion from this same error appearing in several letters, it bears noting.

(Emphasis in original.) The AAO concluded that this letter does not add any examples of specific contributions or explain how they have influenced the field beyond being original. We affirm that conclusion on motion. Bluster cannot substitute for substance.

[redacted] who recruited the petitioner to the University of Massachusetts, Lowell, asserted that she designed an optical sensing system using micromechanical machines (MEMs) for wavefront sensing under a grant from the U.S. Air Force. [redacted] asserts that this system could be used for monitoring and finding hidden targets. [redacted] does not assert that the University of Massachusetts or the U.S. Air Force patented this system or that the military has begun experimenting with this system. The record does not include letters from the U.S. Air Force explaining the significance of this project. Counsel once again concludes that our concerns regarding the lack of confirmation from the Air Force is "inane," without any explanation as to why that information is not relevant or material. We will not withdraw this concern. The Air Force is in the best position to explain how the petitioner's work benefited them, and they have not done so.

The remaining letters in the record of proceedings at the time of appeal were considered at length in our appellate decision and that analysis need not be repeated. Ultimately, the AAO concluded that the witnesses all discuss the importance of the petitioner's projects, an issue neither the director nor the AAO contested. Eligibility for the waiver must, however, must ultimately rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver.

As further noted by the AAO in its previous decision, many of the above witnesses focus on the petitioner's multidisciplinary background. While we acknowledge that the petitioner has obtained multiple advanced degrees in different areas of engineering, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. Counsel does not challenge this conclusion on motion.

The letters from [redacted] an associate professor at UC, Berkeley, and [redacted] a professor at the University of Illinois at Chicago are now a part of the record of proceedings. These letters will now be carefully considered in the context of the record of proceedings as a whole.

[redacted] asserts that the petitioner is a "key researcher" on a $1.5 million research project to provide real time assessment of structures after catastrophic events funded by NSF. Specifically, the petitioner is working on "key parts of this project to develop robust, low cost, wireless, adaptive field sensor networks capable of real time distributed data evaluation and transmission, and visualization and adaptive modeling of the observed phenomenon." [redacted] asserts that the beneficiary's past projects for the U.S. Air Force "are well recognized and considered significant," but does not explain their impact on the field. As stated above, the petitioner has not submitted a letter from a high-level official with the Air Force confirming their use of the petitioner's work.

[redacted] discusses the petitioner's work in his [redacted] research center. [redacted] explains that the petitioner's work with PVDF, "founded by NSF," resulted in sensors that can be used to sense infrared energy and, thus, measure stress and strain. [redacted] asserts that the beneficiary "precisely measured the hybrid frequency response of a charge-mode curvature sensor in the range 0.1-45 (Hz) using a random vibration method in conjunction with a precision displacement stage." [redacted] concludes that the petitioner was the first in the

world to use PVDF successfully and accurately in low frequency applications and that her innovations are considered standard in the field.

If the petitioner's innovations were truly the standard in the field, that would be extremely significant. Once again, however, [redacted] provides no examples of government agencies, universities, or private institutions applying the petitioner's sensors beyond funding the initial research. Thus, we fail to see how the record substantiates the claim that the petitioner's innovations are now "standard in the field." It can be expected that the innovator of technology considered "standard" in the field would be able to provide evidence of frequent citation and letters from independent sources who not only praise the petitioner's work but *affirm using it*. The record lacks such evidence.

It remains, the letters do not explain how the field has already been influenced by the petitioner. We reemphasize that we are not questioning the credibility of the references or substituting our opinions for theirs as to the *technical* assertions they make. It remains, however, that the *non-technical claims* they make would obviously be more persuasive if supported by objective evidence. For example, [redacted] states that the petitioner is "highly cited." As stated in our previous decision, but ignored by counsel on motion, evidence of citation is easy to produce either through a published citation index or electronic citation database. The petitioner, however, has not provided evidence that any of her articles have been cited.

Similarly, the petitioner's references claim that she has developed a first-of-its-kind wireless sensor system that outperforms all other sensor systems, yet they provide no examples of its use. Counsel fails to responds to our valid concern that it can be expected that an individual who had developed a groundbreaking sensor system would be able to produce a patent application for the system, evidence that manufacturers are expressing interest in licensing and marketing the system, and evidence that customers are expressing interest in utilizing the system. The petitioner has not submitted such evidence, even on motion, her opportunity to respond to these concerns. Finally, while the petitioner's references claim that she is among the key personnel on various research projects, the record lacks grant applications identifying her as such.

At the time of filing, on appeal and even on motion, the record lacks evidence establishing that the petitioner has already influenced the field to any significant degree. It is acknowledged that the petitioner has developed a new monitoring device. While innovation of a new method is of greater importance than mere training in that method, such innovation is not always sufficient to meet the national interest threshold. *Id.* at 221, n. 7. The record lacks evidence that the petitioner has patented the device. Even if she had, the petitioner would need to demonstrate that there is a wide interest in licensing the system. *Id.* Alternatively, the record also lacks evidence that the petitioner's work with this device has been widely cited or otherwise adopted. Letters attesting to the importance of the *area* of research and the potential of the petitioner's work in that area are insufficient. As stated above, the record lacks evidence that her device is being adopted or considered for adoption on any building.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of January 31, 2005 is affirmed. The petition is denied.